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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 415

ADELAIDE H. KNIGHT,

Petitioner,

v.

COMMONWEALTH & SOUTHERN CORPORATION and SECURITIES AND EXCHANGE COMMISSION.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE COMMONWEALTH & SOUTHERN CORPORATION

GEORGE ROBERTS,
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Of Counsel.

APPEAL PRINTING CO., INC., 130 CEDAR STREET, NEW YORK, WO 4-3033

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Statement

While we agree that the issues in this case and in the cases of *Niagara Hudson Power Corporation* v. *Leventritt* and *Securities and Exchange Commission* v. *Leventritt*, Nos. 211 and 212, in which oral argument was presented to this Court on December 5, 1950, are so similar that a reversal in that case would necessarily mean an affirmance here, nevertheless, we do not at all agree that the issues are identical or that an affirmance in that case would necessitate a reversal in this.

In this case there was introduced not only the testimony as to the probable future earnings of the Commonwealth system and other evidence of value as well as evidence of market value of the option warrants, but there was also introduced opinion evidence to the effect that the warrants had no value (R. 59a, 60a).

Mr. Whiting, the President of Commonwealth, in testifying as to the fairness of the proposed plan and the provisions thereof with respect to the Option Warrants said:

> "If we were to capitalize common stock earnings at 20 times, which in my judgment is more than liberal, it would require earnings of $1.50 per share to make the common stock worth $30. per share. After all unpaid and accrued dividends on the preferred have been paid this would require earnings if paid up in the amount of 75% of those available of over 78 million dollars. Even if all earnings were paid up by the operating companies to the Corporation, which is impracticable, it would require earnings of over 59 million dollars. The members of the Board saw no prospect of making such earnings and therefore made no provision for the warrants."

Mr. Hartt, an independent engineer having no interest in Commonwealth and a qualified expert in the valuation of utility securities, in his testimony relating to the value of the various securities of Commonwealth, stated:

> "I can see no real value in the rights that the option warrant holders now have."

The following is an excerpt from the transcript of his testimony:

> "Q. Will you also state your reasons for considering the plan to be fair and equitable in making no provision for the option warrants? A. I think

> it is fair and equitable in not making any provision for the option warrants, because I can see no real value in the rights that the option warrant holders now have. It is almost inconceivable that the consolidated earnings applicable to the common stock of the Company will increase in the foreseeable future to such an extent that the option warrants would have any value. * * *"

Accordingly, irrespective of whether evidence as to the reasonably prospective future earnings is sufficient by itself to constitute substantial evidence that the Warrants have no value, there is here ample justification for the holding of the Circuit Court of Appeals when it said:

> "The Second Circuit decision in S.E.C. *vs.* Leventritt, 179 F. 2d 615, involving the reorganization of the Niagara Hudson Power Corporation, agrees that where the Commission's holding is supported by substantial evidence and was arrived at in accordance with legal standards, it must be affirmed. But in that opinion the Court found that the record contained nothing to sustain the Commission decision that the Niagara options were valueless. We take the view, already expressed, that the record in the case before us contained abundant evidence to support the Commission's decision. In reaching this conclusion, we are not unaware of the similarities in the two cases.
>
> On the evidence, the Commission properly held that the Commonwealth option warrants had 'no recognizable value'. Applying the 'fair and equitable' test, it found that the warrants were not entitled to any participation in the reorganization of Commonwealth. In so deciding, we think that the Commission was within its statutory authority and that the District Court correctly approved its action.
>
> The judgment of the District Court will be affirmed."

We submit that in this case there is no reason for granting a writ unless this Court desires to reconsider the doctrine previously announced by it that where a Commission's holding is supported by substantial evidence and was arrived at in accordance with legal standards, it must be affirmed.

In the memorandum of the Securities and Exchange Commission the following suggestion is made:

> "In view of the present status of the Niagara Hudson case, however, we submit it is a matter for this Court's discretion whether it would be more appropriate to grant the writ and set this case for an early argument or to defer action upon this petition until after the Court's decision in Nos. 211 and 212."

We submit that the writ in this case should either be denied or if it is to be granted, that it be set down for argument before a decision is reached in the Niagara Hudson cases.

Respectfully submitted,

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Counsel for The Commonwealth & Southern Corporation.

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Of Counsel.